one comfortably chooses to overlook: it does not treat citizens and persons in the same fashion. Normatively, we can subscribe to that judgment with respect to matters of political participation. But it is a lot harder to do so with respect to the common law blessings of liberty and property, which should be granted, in the twenty-first century like the nineteenth century, to all human beings. Would that we had not forgotten that lesson.

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DEPENDENCE, IDENTITY, AND ABORTION POLITICS

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Introduction

The abortion rights debate is one of the more sensitive and divisive issues in American politics. It would be a mistake to even characterize it as a singular debate. Rather, our abortion rights discourse cuts across several value-laden issues on which Americans harbor strong convictions.[1] For example, the abortion debate implicates the status of human life, the role of women in society, the proper role of the judiciary, and the status and meaning of fundamental rights. This Essay explores a specific dimension of that debate: the intersection between the legal and moral reasoning used both to justify and to limit abortions, and the legal and moral reasoning courts have used when confronting decisions concerning medical choices that parents and doctors must make about certain conjoined twins. This juxtaposition reveals both how the treatment of one bioethical situation can have a direct impact on how courts continue to review the permissibility of abortion, and how courts might use new facts and understandings to approve further limitations on the availability of abortions. Each such case can define how society understands the contours of the abortion debate.

In the relatively new field of the law of bioethics, courts and lawmakers are often confronted with novel issues concerning the status and definition of human life. Examples of this are the status of embryos used for in vitro fertilization[2] and the status of embryos used in stem cell research.[3] These two frameworks produce very different understandings of the embryo and human life. The former emphasizes the embryo as part of a path to a new human being, while the latter emphasizes the embryo as cells with invaluable therapeutic purposes.

This Essay selects a particular case in bioethics, *In re A*,[4] an English case permitting a hospital to separate conjoined twin girls, Mary and Jodie, over the objection of the parents, to illustrate how the language and concepts employed in a case facially unrelated to the issue of abortion can impact the abortion debate. My central thesis is that lawyers and judges writing in the field of bioethics must be vigilant not only about outcomes, but also about legal and philosophical reasoning in related bioethical debates. An effort to reach a "correct" decision in one bioethical situation might ultimately constrain future cases and issues in unintended ways.

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[1] *See generally* Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101 (2003) (providing a general treatment of the many ethical and social dimensions of abortion).
[2] *See, e.g.*, Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998); A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000).
[3] *See generally* Monitoring Stem Cell Research, *available at* http://www.bioethics.gov/reports/stemcell/pcbe_final_version_monitoring_stem_cell_research.pdf; Marta Brodsky, Note, *The Viability of Our Humanity: Will the Supreme Court's Abortion Jurisprudence Survive the Challenge of Embryonic Stem Cell Research?*, 76 ST. JOHN'S L. REV. 225 (2002).
[4] *In re* A, [2001] Fam. 147 (U.K.).

Part I begins by examining how bioethical reasoning can impact abortion discourse, often in more subtle ways than one would first imagine. I then detail the troubling facts of *In re A* and the English court's uneasy legal resolution. I propose that such a decision, if rendered in the United States, could alter the contours of abortion jurisprudence because the court unequivocally assumes that Mary, the non-viable twin, is a person without considering the logic or ramifications of this contention.

Part II presents the theoretical argument that Mary and a fetus are practically indistinguishable. It argues that the ways in which we understand a fetus as distinct from an infant apply exactly to Mary. This Part also introduces the concept of a "gatekeeper theory of personhood": that is, a strategy of identifying qualities that are *not* features of personhood and situating the fetus squarely in those categories. Part III applies this comparison to the current law regarding abortion in the United States. The line drawn in *Roe v. Wade* permitting states to prohibit abortions only after the fetus has become viable has been heavily criticized as arbitrary. However, I suggest that the reasoning used in Part II to conclude that Mary is not a person provides a solid defense for maintaining the current constitutional standard for the permissibility of abortions. The Conclusion then suggests how a court ought to resolve a case with similar facts to *In re A* that is most consistent with current abortion doctrine in the United States.

I. The Significance of Bioethical Reasoning to Abortion Debates

Persons disfavoring prohibitions on abortion frame the abortion debate around the issue of the rights of persons to make important decisions regarding their health and bodily autonomy. Despite this desire to focus the discourse on the woman, her body, and her choices, pro-choice activists do not have the luxury of ignoring developments in science and the law that impact the abortion debate. For example, pro-choice activists often fear that laws that criminalize harm to a fetus will either limit abortion rights or undercut the reasoning used to support pro-choice policies.[5] This represents an instance where both the outcome and the reasoning behind a legal development are damaging to abortion rights. This Essay highlights instances when the reasoning itself behind a legal development could influence the contours of abortion jurisprudence. Part I.A examines how cases involving the disposition of certain conjoined twin neonates can have consequences for abortion rights analysis. Part I.B then details the facts of *In re A*, which could have a significant impact on abortion jurisprudence.

[5] *See, e.g., Unborn-Victims Bill Passes House*, WASH. POST, Feb. 27, 2004, at A2 (detailing Congress' passage of a bill making attacks against pregnant women into two separate crimes—an attack against the woman and an attack against the fetus—which pro-choice activists immediately complained "would undermine abortion rights by giving fetuses new federal legal status").

A. Consequences for Abortion Jurisprudence

The abortion debate encompasses many issues and arguments, but the notion of personhood is particularly important. The argument, in its simplest form, posits that states ought to protect persons from public and private harms, and should extend these given protections to all persons. Thus, a fetus or embryo has the same entitlements to be free from mortal harm as post-natal persons do if a fetus or embryo is indeed a person. It is not surprising, then, that many of the arguments made in the abortion debate center around the question of whether an embryo or fetus is a person. The arguments can be scientific, religious, moral, or philosophical in nature, but all seek to answer the problem of which living beings are rights-bearing agents.

Given the sensitivity of such judgments, courts often attempt to side-step the issue. Justice Blackmun, for example, proclaimed that the court would attempt to avoid the religious or moral convictions about abortion and instead "resolve the issue by constitutional measurement, free of emotion and predilection."[6] The English court echoed this sentiment in *In re A*, announcing that "[t]his court is a court of law, not of morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us."[7] However, a refusal to address issues of personhood only obscures the legal arguments and creates the potential for inconsistent legal doctrines. As Peter Singer has argued in *defending* abortion rights, "[t]his may be good politics, but it is poor philosophy .... No-one who thinks that a human fetus has the same right to life as other human beings could see the abortion question as a matter of choice, any more than they would see slavery as a matter of the free choice of slaveholders."[8]

In Part III I argue that legal decisions like *Roe v. Wade* accept a certain notion of personhood. These cases hold that the state may not prohibit abortions before the fetus becomes viable.[9] In so doing, the Court has decided that the rights and interests of one class of beings will never outweigh the rights and interests of persons with competing claims. This division suggests a fundamental difference between persons and non-viable fetuses. Though jurists may wish to stay clear of the philosophical complexities of personhood, it is equally unsettling to imagine that, under our Constitution as currently amended and understood, there are *persons* with a lesser status than others.[10]

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[6] Roe v. Wade, 410 U.S. 113, 116 (1973).

[7] In re *A*, (2001) Fam. at 155.

[8] PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 85 (1994).

[9] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992); *Roe*, 410 U.S. at 163.

[10] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) ("[A]t the time of the adoption of the Constitution [African-Americans] were considered as a subordinate and inferior class of beings .... The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions.").

It is of great importance, then, that lawyers with an interest in the law of bioethics monitor competing conceptions of personhood in the law. In the following section, I present the facts of *In re A*, which contains legal reasoning that supports a specific concept of personhood.

B. The Factual Background and Legal Disposition

In the fourth month of her pregnancy, an ultrasound examination revealed that Mrs. A.M. was carrying conjoined twin girls. The examining physician concluded that he would be unable to provide adequate medical care in Malta for this highly unusual situation and arranged for Mrs. A.M. to travel to England for the duration of the pregnancy. The twins were born with a condition known as "ischiopagus tetrapus," leaving the twins conjoined at the lower pelvis.[11]

One twin, Jodie, appeared to be normal and healthy. She cried, was active, and made spontaneous breathing efforts.[12] The other twin, Mary, had severe problems. The trial court heard lengthy testimony from several experts concerning Mary's condition. Mary had no chest or breath sounds and the doctors were unable to intubate Mary. One doctor testified that after considerable effort, "'he could pass the end of the clear tube into her main airway.'"[13] Despite this "'he was not able to detect any gasway at all, nor when he put a monitor into the ventilator to track for excretion of carbon dioxide did he detect that any carbon dioxide, which should be being exhaled, was coming out. So we never had any evidence that she has breathed for herself at all.'"[14] Mary's head was enlarged due to swelling. The court described Mary's brain as "poorly developed" and "primitive" while a neurologist testified that "the degree of abnormality of Mary's brain" was "[v]ery severe indeed."[15] Mary had "a virtual absence of functional lung tissue"[16] and was centrally cyanosed, or "severely deoxygenated."[17] Finally, Mary's heart was "very dilated and very poorly functioning. In terms of actually pumping blood out round the body it is doing very little work of its own accord . . . if Jodie wasn't covering Mary's circulation she wouldn't be alive now if they were separate twins."[18] The circulatory problems were a crucial fact for the court because "Jodie's aorta into Mary's aorta and the arterial circulation runs from Jodie to Mary."[19] The lengthy

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[11] In re *A*, (2001) Fam. at 158. The Court described this condition: "The ischium is the lower bone which forms the lower and hinder part of the pelvis—the part which bears the weight of the body in sitting. The lower ends of the spines are fused and the spinal cords joined. There is a continuation of the coverings of the spinal cord between one twin and another. The bodies are fused from the umbilicus to the sacrum." *Id.*

[12] *Id.* at 157.

[13] *Id.* at 158.

[14] *Id.*

[15] *Id.* at 161.

[16] *Id.* at 162.

[17] *Id.* at 157–58.

[18] *Id.* at 161.

[19] *Id.*

opinion reiterates at several points that Mary was "not capable of separate survival."[20]

Any disputes between medical experts were generally over small details, and the higher court reported succinctly that, "[h]ad [Mary] been born a singleton, she would not have been viable and would have died shortly after her birth. She is alive only because a common artery enables her sister, who is stronger, to circulate life sustaining oxygenated blood for both of them."[21] The medical team further concluded that, though Jodie had healthy and functioning organ systems, the support she gave to her sister would eventually take a fatal toll, and that Jodie's heart would fail under the stress of supporting both bodies.[22] The physicians further concluded that the twins successfully could be separated. Though Jodie might suffer some disabilities, the doctors generally agreed that she would have normal life prospects after the operation. Mary, on the other hand, would not survive the operation, as she was incapable of survival on her own. The parents, devout Roman Catholics, objected to the operation on religious grounds, claiming that, "'we cannot begin to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive.'"[23] The hospital decided to proceed with the operation, and the parents sought an injunction to stop the doctors from performing the surgery.

In a very lengthy opinion, the British high court for family law refused to enjoin the hospital from proceeding with the operation. The court based its decision on two grounds. First, they found that both Jodie and Mary had a right to life and that the operation was in the interest of Jodie but not in the interest of Mary. A lengthy balancing analysis, however, led the court to conclude that the operation was permissible, especially when understood as a positive act of invasive surgery and not an act of withdrawal of treatment. Second, the court held that the doctors would not be criminally liable because the purpose of the operation was to save the life of Jodie, and there was no intent to kill Mary. A full analysis of the merits of the court's opinion is beyond the scope of this Essay. However, I would note that the court's opinion, while a valiant attempt at resolving extremely difficult issues of law and morality, falls short of one's expectations for consistent, reasoned analysis. One reason for this is that, given the court's recognition of Mary's personhood, it was then required to engage in the balancing of rights and exploration of philosophical problems such as the doctrine of double effect.[24] If the court had focused on

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[20] *Id.*

[21] *Id.* at 155.

[22] *Id.* at 162–63. Doctors apparently disagreed about how long Jodie could support Mary, but even the most generous estimate gave a life expectancy of three to six years.

[23] *Id.* at 172.

[24] The doctrine of double effect is a moral theory that distinguishes between intended and foreseen consequences. *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1139 (2003) ("[T]he doctrine of double effect asserts that it may, sometimes, be more permissible to bring

the fact that Mary did not qualify as a "person," the judges could have avoided reaching these difficult issues.

The important feature of the court's decision for the purposes of this paper is its recognition of Mary's status as a person. This conclusion is evident in the court's holdings—both depend on the idea that Mary is a person whose rights and claims must be respected and balanced—as well as in the express language of the court. The court in fact found the proposition so self-evident that they hardly engaged in any examination of personhood at all, instead noting that "it would be contrary to common sense and to everyone's sensibilities to say that Mary is not alive or that *there are not two separate persons.* It is, therefore, unnecessary to examine the law in any depth at all."[25] This is a rather startling conclusion, and surprising in light of the length of the opinion. Given the court's willingness to make extensive inquiries into several areas of both criminal and family law, it is a bit disingenuous to decline the opportunity to further analyze an area of law that would bear directly on the disposition of this case. The statement is probably best explained by a sense of history on the part of the court—the judges were aware of past status of "monsters"[26] assigned to conjoined twins, and likely wanted to do their best to promote the dignity of the lives involved. This reflects the view held by some that human life has an intrinsic sanctity independent of whether that being is a "person."[27] In contrast, I argue in Part II that by assigning Mary the status of person, the court's opinion ultimately serves only to devalue human life, as Mary is now a person, but a person with lesser rights and claims than that of a normal and healthy human.

There is another manner in which *In re A* is instructive—it appears to hinge on other rights concerns. *In re A* seems to be a case about parental rights, freedom of religion, and end-of-life decisions. Indeed, all of the writings on this case to date have addressed these problems,[28] and they have all unquestioningly assumed that

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about harm as a foreseen or foreseeable but unintended side effect of one's otherwise permissible activity than to bring about equally weighty harmful consequences as an intended means or end of one's activity.").

[25] In re *A*, (2001) Fam. at 181 (emphasis added).

[26] *Id.* at 149.

[27] Ronald Dworkin has suggested that the belief that human life is intrinsically sacred or inviolable is held by persons in *both* the pro-choice and pro-life movements. RONALD M. DWORKIN, LIFE'S DOMINION 84 (1993). For a criticism of this view, see JEFF MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 210-11 (2003).

[28] *See* George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-Ordered Killing of One Conjoined Twin to Save the Other*, 33 CONN. L. REV. 1275 (2001); Lisa M. Hewitt, Note, *A (Children): Conjoined Twins and Their Medical Treatment*, 3 J. L. & FAM. STUD. 207 (2001); Shellie K. Park, Comment, *Severing the Bond of Life: When Conflicts of Interest Fail to Recognize the Value of Two Lives*, 25 U. HAW. L. REV. 157 (2002); Barry A. Bostrom, Nota Bene, *In Re A (Children): In the Royal Courts of Justice (England)*, 17 ISSUES L. & MED. 183 (2001); Jacqueline B. Tomasso, Note, *Separation of the Conjoined Twins: A Comparative Analysis of the Rights to Privacy and Religious Freedom in Great Britain and the United States*, 54 RUTGERS L. REV. 771 (2002); Heather Tierney, *Conjoined Twins: The Conflict Between Parents and the Courts Over the Medical Treatment of Children*, 30 DENV. J. INT'L L. & POL'Y 458 (2002); Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481 (2002).

Mary is a person, and therefore the resolution of the case necessarily involves balancing rights and interests in the way that one would with two or more persons.[29] Balancing these rights are issues that pro-choice activists can and should care about. However, *In re A* might demonstrate that in a rush to reach the "correct" decision on these or other bioethical issues, a court may deliver an opinion that is directly contrary to desirable reasoning in other areas of biomedical ethics. In other words, allowing Mary to die in order to save her viable twin is hardly a victory for the pro-choice camp if she is then considered a "person" in the context of abortion, with rights that can outweigh those of the mother.

II. Is Mary a Person?

This Essay attempts to understand the ontological status of Mary in a manner that is most consistent with the conception of personhood adopted by courts in the abortion debate, that is, by comparing Mary to a non-viable fetus. Ronald Dworkin has advocated the exploration of this type of personhood for the purposes of analyzing questions such as abortion rights because "the claim that a fetus is a person means only that it has a right to be treated *as* a person, that is, in the way we believe creatures that are undeniably persons, like you and me, should be treated ... without deciding whether or not they satisfy whatever standards of consciousness we might think necessary for personhood in the philosophical sense."[30]

Personhood is often defined in reference to autonomy, that is, the degree of physical and psychological freedom a being has from other persons. Autonomous personhood has two general uses in philosophy. One is to explore the contours of the autonomous individual in the world, questioning what it means to be *me* as opposed to anyone else,[31] or how I know that I am the same person over time.[32] The other is to define the *meaning* of the concept of person.[33] The relevant questions are: What degree of independence do I need from others in order to qualify as a person? What is the quality or nature of that independence that makes me a person? I address the first problem of personal identity briefly in my discussion of potentiality, and begin instead with the concept of personhood.

Jeff McMahan has recently argued that these two questions are linked and that the difference between the two inquiries is "superficial" because "[a] claim

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[29] There is a considerable philosophical literature that addresses these difficult issues in both general and legal contexts. *See generally* 1 FRANCES M. KAMM, MORALITY, MORTALITY: DEATH AND WHOM TO SAVE FROM IT (1993); PETER UNGER, LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE (1996); PETER SINGER, PRACTICAL ETHICS (2d ed. 1993); PETER SINGER, RETHINKING LIFE AND DEATH (1994); Shiffrin, *supra* note 24.

[30] DWORKIN, *supra* note 27, at 23.

[31] *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 199–345 (1984); THOMAS NAGEL, THE VIEW FROM NOWHERE 28–60 (1986).

[32] MCMAHAN, *supra* note 27, at 7 ("The problem of personal identity over time may be approached in either of two ways. We may ask what is necessarily involved in our continued existence. Or we may ask what sort of thing we are essentially.").

[33] *See* PARFIT, *supra* note 31, at 202.

about what kind of thing we essentially are implies a set of conditions for our continued existence."[34] This may be true for the philosopher who is attempting to construct a complete account of personhood and personal identity. However, I believe that a "Gatekeeper" approach allows one to evaluate each question distinctly and draw limited conclusions for each question without having to provide a complete account of either personhood or personal identity. In other words, my proposed conclusion that certain "physically dependant" beings are not persons might inform our idea of what it means to be the same person over time, but it by no means dictates a complete or decisive answer to that inquiry.

There are a host of qualities that may make a being a "person." Cognition is often thought to be one such quality. Descartes' formulation (the famous "cogito ergo sum") has produced a lively and continuing debate about mind/body dualism.[35] Other thinkers focus on the power or quality of cognitive abilities[36] (this is often used to separate humans from other thinking animals), or the quality of retaining the same memories and experiences over time.[37] Other thinkers focus on such factors as the ability to feel fear and suffering, and still others rely on religious conceptions of beings with souls.[38] Ronald Dworkin has suggested the further argument that, even absent specific religious convictions, determinations of the "intrinsic moral significance" of a human life are a primarily spiritual matter.[39] The debates cannot be said to have been resolved, and have led to rather counterintuitive conclusions, such as Peter Singer's argument that some animals are "persons"[40] whereas some severely deformed or disabled human infants are not.[41]

The philosophical concept of personhood thus presents a puzzle. On the one hand, it appears to be very difficult, if not impossible, to arrive at a precise definition of "person." As Bernard Williams has argued, "[t]he category of person, though a lot has been made of it in some moral philosophy, is a poor foundation for ethical thought, in particular because it looks like a sortal or classificatory notion while in fact it signals characteristics that almost all come in degrees."[42] The "point"

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[34] MCMAHAN, *supra* note 27, at 7.

[35] RENE DESCARTES, MEDITATIONS ON THE FIRST PHILOSOPHY (2d ed., J. Cottingham ed. & trans., Cambridge Univ. Press 1996) (1641).

[36] For a summary and critique of such theories, see MCMAHAN, *supra* note 27, at 39–66.

[37] *See, e.g.*, JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1689).

[38] There are different religious views regarding the personhood status of the fetus. For example, since 1869 the Catholic Church has taken the position that a fetus is a person from the point of conception onwards. *See, e.g.*, Paul D. Simmons, *Religious Approaches to Abortion*, *in* ABORTION, MEDICINE, AND THE LAW 713 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992). Jewish law, on the other hand, maintains that a fetus is not a person until the point in birth when "the major part of the fetus has emerged." DANIEL B. SINCLAIR, JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS 12 (2003). For a general discussion and critique of the role of souls in conceptions of personhood, *see* MCMAHAN, *supra* note 27, at 7–24.

[39] DWORKIN, *supra* note 27, at 35.

[40] PETER SINGER, PRACTICAL ETHICS, 110–17 (2d ed. 1993).

[41] *Id.* at 117–19.

[42] BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 114 (1985).

at which a being becomes a person may look more like a process,[43] and the features of personhood may look more like a spectrum, or a range of characteristics.[44]

On the other hand, the concept of personhood seems to be an important, if not indispensable, category for defining rights-bearing persons, an especially important concept in law. Our notions of rights and equality are rooted in the idea that there is something common and universal about persons that demands a certain baseline of equal recognition and treatment under the law. As one judge has remarked, we live in an era of rapidly advancing biomedical technology in which it will become increasingly difficult for lawmakers and judges to avoid defining the category of person.[45] Thus, the project of examining personhood is inescapable, but one's methodology should be tailored to best address the problems that philosophers have identified. In other words, if it is true that a complete account of personhood and personal identity will return indeterminate results for the hardest cases, it is sensible to reduce this indeterminacy as much as possible by focusing on small properties that can answer discrete questions.

In this Part, I undertake what I will call the Gatekeeper approach to the analysis of personhood. Instead of trying to construct an entire theory of what it means to be a person, I will try to identify particular aspects or features of being that we can definitively exclude from personhood in order to reach the conclusion that neither Mary nor the non-viable fetus is a person. Using this technique it may never be possible to come up with a precise or final definition of person. However, there could be many uses in both philosophy and law for a simpler method of identifying certain beings that unmistakably are not persons.

My strategy thus has a few advantages. First, by limiting my analysis to the argument that a non-viable fetus is not a person, I do not exclude the possibility that viable fetuses also are not persons. Thus the argument does not limit the line of permissibility for abortion *only* to viability, and other criteria may be available to determine the (non)personhood status of the viable fetus. A second and related advantage is that this method of reasoning will allow us to limit our analysis to Mary and the non-viable fetus, excluding from the analysis other controversial beings such as humans who are brain dead or in persistent vegetative states (PVS), or higher vertebrate animals. I seek through this analysis to conclude that the non-viable fetus is not a person, thus providing the strongest underpinning to current abortion law[46] while leaving the personhood status of these other beings open for

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[43] *See* PETER SINGER, RETHINKING LIFE AND DEATH 95 (1994) ("To ask in which hour of this process a human life begins may seem as pointless an exercise as the proverbial scholastic debates about how many angels could fit on the head of a pin.").

[44] Derek Parfit has used this sort of analysis in investigating the question of what it means to be the same person over time. PARFIT, *supra* note 31, at 219–45.

[45] Jeffery L. Amestoy, *Uncommon Humanity: Reflections on Judging in the Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1583 (2003) ("The challenge for future generations will be to define what is most essentially human.").

[46] *See infra* notes 86-106 and accompanying text.

debate. This method of analysis helps counter the rejoinder that we cannot ever know exactly when something is or becomes a person. I explore two features of personhood: the qualities of dependence and rights.

A. Attachment to and Dependence on Another Human Being

I propose to analyze the relationship of autonomy to the concept of personhood by examining the manner in and degree to which persons actually function as autonomous, or separate from other persons. That is, how does dependence on others define personhood? I will discuss three meanings of dependence, which I will label "general dependence," "material dependence," and "physical dependence." It becomes clear that beings that exhibit a very specific sort of dependence are not persons, while beings that are otherwise dependent *may* (but do not necessarily) qualify as persons.

1. General Dependence

Nearly all living beings, and indeed, all persons are, to a certain degree, dependent upon others. It is, in my opinion, one of the better insights of modern Continental and feminist philosophy to identify and explain the ways in which personal identity is formed by mutual dependence, and to explore the importance of interpersonal dependence to moral and political philosophy,[47] and to break down the myth of the truly "autonomous" person.[48] I have chosen "dependence" as a relevant hallmark of what makes a being an individual person. One could explore similar ideas by examining the concept of control and asking the question: "How much control does the being exert over itself?" This analysis would result in categories similar to those yielded by the dependence analysis.[49] Thus, mere dependence upon others cannot be what distinguishes persons from non-persons. I am speaking of a more specific sort of dependence: a true and complete material dependence on others.

2. Material Dependence

A person is materially dependent on others if the significant detachment of that individual from the care of others would bring about fatal consequences. For example, babies are materially dependent on their mothers, and brain-dead patients are materially dependent on machines and doctors. It is unquestioned that, without outside care, the infant and the brain-dead patient would die. However,

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[47] *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989). *See also* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 41–47 (1992) (describing Sandel's criticism of Rawls's view of the human being as one of "asocial individualism" that assigns "absolute moral priority to the subject over its ends").

[48] *See generally*, DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS (1993).

[49] Foucault provides an interesting examination of how persons are always somewhat "controlled" by others in his discussion of "docile bodies." *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 136–39 (Alan Sheridan trans., Vintage Books 2d ed. 1995).

notice that the *source* of care is unimportant because the caregivers in these situations are interchangeable. Notice that the particular identity of the caregiver is unimportant. Although caregivers often need specific qualifications, such as a doctor who is caring for a brain-dead patient, the identity of the caregiver is otherwise irrelevant. Even in cases where being a caregiver requires highly-specialized qualifications, it is unlikely that these qualifications would be so specific and unique that they would point to only one person over time and space. The caregiver may need specific qualifications, such as a doctor's medical training, but even here the unique identity of the caregiver is not what matters, only her qualifications. These qualifications are of undeniable importance—beings in especially precarious medical conditions will require caregivers with highly specialized knowledge and training. However, it is unlikely that these qualifications are so specific and unique that they would point only to one unique person over time and space.[50]

The classification of "materially dependent" is not sufficient for a being to be a person, because the category is over-inclusive. It includes, for example, many animals that most of us are unwilling to consider persons. In fact, many adult animals are *less* of a dependant than an infant, or a person in a PVS. Thus, all we know about material dependence is that it describes a wide variety of beings and does not *disqualify* a being from the status of personhood. It will take other qualities to affirmatively describe a person.[51] What the next section demonstrates is that Mary falls into a category of dependence that delineates a class of beings that are clearly *not* persons.

3. Physical Dependence

Some beings that are alive owe their continued existence to complete dependence upon a physical attachment to a unique other. The paradigmatic example is the non-viable fetus: this being could not continue to exist *but for* physical sustenance from the *specific* woman to which it is attached. It is thus difficult to characterize this being as an autonomous person, not because of the dependence itself, as we have already decided that persons can be dependent, or even *materially* dependent upon others. Rather, these beings are not persons because it is difficult to understand them as separate from others. That is, they are not autonomous because they are both dependant on another and a *part* of another. The fetus' dependence on its mother does not destroy its personhood, as we have already seen that persons can be dependent, and even materially dependent on others. The fetus lacks personhood because, in addition to being dependent on another, it is *part* of another. It

[50] I am setting aside the question here of whether there can even *be* unique persons over time and space. *Cf.* PARFIT, *supra* note 31. Suffice it to say that we can accept as true that personal identity remains constant for one person over a lifetime.

[51] P.F. STRAWSON, INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS 104 (1959) ("[T]he concept of a person is to be understood as the concept of a type of entity such that both predicates ascribing states of consciousness and predicates ascribing corporeal characteristics . . . are equally applicable to an individual entity of that type.").

is important, however, not to confuse being "part" of something as the mere state of being connected to it.

However, being "part" of another does not necessarily imply physical dependence on another or eliminate the possibility that each part is a person. For example, it is perfectly natural to think of conjoined twins in which a successful separation operation is possible, but has not yet been performed, as separate persons who are not physically dependent on each other.

Conversely, being a physically independent "part" of another does not guarantee that something is a person. It would be silly to think of a part of my body such as my heart as a "person" simply because my heart can live viably in another person. The attribute of physical dependence is doing the work in the argument, not the attribute of attachment to some other thing. Attachment is merely a consequence of the peculiar nature of physical dependence.

How, then, shall we explain the status of a heart, kidney, or other organ that is only materially dependent (i.e., it may be transplanted to another body and continue to live)? This illustrates my methodology of "Gatekeeper" personhood by which we seek to identify categories of things that are definitively not persons, rather than seeking a positive definition of personhood. In the case of a transplantable organ, then, dependence is not what will inform us that it is not a person. Rather, we would look to some other category of non-personhood. For example, organs have no brain function, and we would likely conclude that this is a feature of non-personhood (as distinguished from a being with a non-functioning or questionably functioning brain which would present a harder case).

How might we distinguish Mary and the non-viable fetus from other beings that are clearly persons? Both Mary and the non-viable fetus share a quality of physical dependence because life for either of them is impossible without the constant and continued dependence on the specific other. A further comparison is instructive. In 1971, Judith Jarvis Thomson offered an intriguing analogy to abortion. She asked readers to imagine:

> You wake up in the morning and find yourself back to back in bed with a ... famous unconscious violinist. He has been found to have a fatal kidney ailment, and ... you alone have the right blood type to help .... [T]he violinist's circulatory system was plugged into yours .... To unplug you would be to kill him. [You are required to support him because] all persons have a right to life and violinists are persons. Granted, you have a right to decide what happens in and to your body, but a person's right to life outweighs [this right]. So you cannot ever be unplugged from him.[52]

[52] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47, 48–49 (1971).

Thomson suggests that the ordinary person would find this "outrageous" and thus realize the implausibility of arguments that fetuses have an absolute right to life.

As a preliminary matter, it is important to notice how influential Thomson's thought experiment has been.[53] I would argue that this is because the relationship of the embryo or fetus to the woman is one that is so unique that it took a science fiction-like example in order to explore the nature and extent of the relationship.

In making this argument, Thomson sought to explain why abortion is morally permissible, even if one were to assume that the fetus really is a person.[54] This is meant to answer two problems in the abortion debate: first, it would allow discourse on the subject without reference to the more religious ideas of life, and second, it answers people's intuitive reaction that later-term fetuses really are persons.[55] What follows in her article is an explication of how persons do not owe those specific sorts of duties of rescue to other beings, even other living, rights-bearing persons. In the discourse subsequent to the publication of her article, Thomson's rights balancing analysis has been questioned and criticized on a number of grounds, for example, that the right of bodily autonomy cannot be equated with or trump the right to life of another,[56] or criticisms of her understanding of the acting/allowing distinction with regards to killing and letting die.[57] For present purposes, however, it is the striking image of the unconscious violinist that illustrates the concept of physical dependence because it confirms the intuition that persons are independent, and to live independently from others has a very specific meaning in this sense. Here, however, I move beyond her story as mere metaphor or analogy to show the analytical value of the picture she draws.[58]

1. Distinguishing Attachment and Physical Dependence

Properly understood, physical dependence can be used as a criterion for excluding some beings from personhood. Suppose, for example, that the facts about Mary and Jodie remain exactly the same except that they are born separated. The doctors immediately conclude that though Mary has little organ function and is centrally cyanosed, she can be sustained if they deliver oxygenated blood intravenously. This situation would raise routine questions of the biomedical ethics surrounding neonates.

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[53] A Westlaw search revealed that the article has been cited in 71 law review articles. This does not count the number of other academic articles and books that cite this work.

[54] Thomson, *supra* note 52, at 48.

[55] *Id.*

[56] Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1675–76 (1998).

[57] *Id.*

[58] *Cf.* DANIEL DENNETT, ELBOW ROOM 12 (1984) (questioning the value of such thought experiments in moral reasoning); Richard Epstein, *Lifeboats, Desert Islands, and the Poverty of Modern Jurisprudence*, 68 MISS. L.J. 861, 881 (1999) ("All too often, however, wholly imaginary examples are given too much weight.").

Suppose, however, that the doctors further determine that, due to some rare condition, Mary can only be sustained by daily transfusions of Jodie's and only Jodie's blood, or perhaps that Mary requires a kidney of which Jodie is the only possible donor.[59] Again, this raises significant biomedical ethics problems. Notice here, however, that though Mary's life is *contingent* upon Jodie, she is not yet *physically dependent*.[60]

Finally, suppose that the doctors determine that the only way to sustain Mary is by connecting her intravenously and permanently to Jodie and only to Jodie. This is the case of *In re A*, save for the fact that the attachment occurs post partum. Here, Mary is physically dependent. Notice that all three cases present difficult questions about how to understand Jodie's rights. In the first two cases, there is at least a strong intuitive case to consider Mary's rights as well. Mary's status is called into question most clearly in the third scenario. In this case, Mary is (or would become) a part of Jodie. This violates the idea that persons are autonomous beings that have boundaries that separate them from one another.[61]

When *persons* are somehow attached to other beings or to machines, the *specific* attachment is only temporary, even if the need for attachment is permanent. This is because even the materially dependent being can be transferred, as a separate and bounded person, from one attachment to another. The physically dependent being, however, cannot be transferred as a separate and bounded person and its identity is thus not only linked to the other to which it is attached, but it seems to have no identity of its own at all. It is not the physically dependent being's *need* for permanent attachment that is significant; it is that the specific attachment itself is permanent.

4. Physical Dependence and Intuitive Conclusions About Persons

I suspect that by this point some readers who are convinced by my arguments that physically dependent beings are not persons are, nonetheless, still uneasy with the conclusion that Mary is not a person. This uneasiness might come from an intuition that a being that so resembles a human in form must be a person. Scholars who argue that a fetus is a person, for example, have capitalized on these intuitions by using ghastly images of aborted fetuses. These pictures are meant to appeal to a sense that it is wrong to harm persons, and these beings look just like

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[59] *See* Hart v. Brown, 289 A.2d 386 (1972) (in which parents of seven-year-old twins brought a declaratory judgment action, seeking a declaration that they had the right to consent to the transplant of a kidney from one twin to the other).

[60] An exploration of the relationship of contingency, as opposed to physical dependency, is beyond the scope of this paper. It may be that contingent beings of this sort are not persons, although the case is not as clear as that of physical dependency.

[61] Postmodernists have addressed the concept of personal boundaries. *See* JACQUES DERRIDA, *The Ends of Man*, *in* MARGINS OF PHILOSOPHY 109 (Alan Bass ed. & trans., Univ. of Chicago Press 1982).

tiny persons.[62] Though this image and intuition might cause some initial discomfort, it is important to test this idea against intuitions in other cases. This is particularly important in light of the criticism that scholars defending the morality of abortions have relied too heavily on images and thought experiments.[63]

In December of 2003, a woman gave birth to a daughter, Rebeca, with a rare birth defect known as craniopagus parasiticus.[64] This is a birth defect in which the mother gives birth to "[c]onjoined (grown-together) twins that are united at the heads or crania . . . with one twin only partly developed and regarded as a parasite on the other."[65] In this case, the second head had its own brain and partially formed facial features. CNN reported that "[a]lthough only partially developed, the mouth on her second head moves when Rebeca is being breast-fed. Tests indicate some activity in her second brain."[66] Assume for the moment that there is at least a plausible argument that this second head was in fact a person.

The news reports of this event, as compared with the reports surrounding *In re A*, reveal strong intuitions about the status of beings with fully formed human features. From the outside, the conjoined twins of *In re A* might strike one as two individuals connected at the chest: one sees two pairs of arms and legs, two heads with two sets of facial features, and so on. Coverage of the birth reflected this view, as newspapers around the globe reported the birth of conjoined twins.[67] In contrast, the reporters covering Rebeca's birth portrayed the event as the birth of one person, not two. Multiple newspapers ran the story with headlines describing, in various terms, a "two-headed baby."[68]

It is unclear, however, what difference, if any, there is between Rebeca's "second head" and Jodie's "twin sister." Both were physically dependent on the other twin and incapable of independent existence in any sense. Both had elements of human features, differentiated only by the fact that Mary's were much more

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[62] *See* Dolgin, *supra* note 1, at 129 (discussing how anti-abortion activists have made particularly effective use of the fetus and embryo as a symbol).

[63] *See, e.g.*, Heidi Li Feldman, *Foreword: Beyond the Model Rules: The Place of Examples in Legal Ethics*, 12 GEO. J. LEGAL ETHICS 409, 425–26 (1999); Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993).

[64] *Dominican baby born with second head scheduled for rare surgery* (Feb. 5 2004), *available at* http://www.cnn.com/2004/WORLD/americas/02/04/dominican.two.heads.ap/index.html [hereinafter *Dominican baby*].

[65] *Craniopagus Parasiticus*, *in* 2 ATTORNEYS' DICTIONARY OF MEDICINE 6437 (1962).

[66] *Dominican baby*, *supra* note 64.

[67] *See, e.g.*, *Girl Dies as Joined Twins are Separated*, CHI. TRIB., Nov. 8, 2000, at 4; *Surviving Siamese Twin Battles for Her Life*, N.Y. DAILY NEWS, Nov. 8, 2000, at 10; *Siamese Twin is Separated, 'Sadly Dies' to Save Her Sister*, N.Y. TIMES, Nov. 8, 2000, at A9; *Separation of Conjoined Twins Proceeds Despite Protesters*, THE IRISH TIMES, Nov. 7, 2001, at 15.

[68] *See, e.g.*, *Infant With Two Heads Dies*, N.Y. TIMES, Feb. 8, 2004, at A8; *Surgeons Remove Baby's Second Head*, THE TORONTO STAR, Feb. 7, 2004, at A16; *Battle to Save Two-Headed Baby*, IRISH INDEPENDENT, Feb. 7, 2004, at 1; *Doctors in 13 Hour Operation to Save Baby With Two Heads*, THE TIMES (LONDON), Feb. 7, 2004, at 19; Louise Harrison, *Tragedy of 2-Headed Baby: Little Rebeca Dies After 11 Hour Op*, SUNDAY MIRROR, Feb. 8, 2004, at 36.

fully developed. Finally, both had some sort of rudimentary sensory response. Doctors reported that Mary exhibited some primitive response to painful stimuli,[69] and Rebeca's second head showed some evidence of brain activity and a moving mouth.[70] In fact, it appears that Rebeca's second head showed more brain activity than Mary. Given those facts, on some accounts of personhood that rely on cognitive function, the second head would be closer to the definition of a person than Mary.

What, then, leads people to conclude that Mary and Jodie are two persons, whereas Rebeca is one person with two heads? If it is only that Mary at first glance resembles a person, then this is not enough to overcome the arguments I have made above that physically dependent beings are not persons.

This analysis reaches farther than a clever thought experiment. Unlike the unconscious violinist, Jodie and Rebeca were real children, born to real parents. One can only imagine what a nightmare such events must have been for the parents. Because these scenarios are and will continue to be real, clarity of thought and argument when reacting to live human tissue in its various forms is imperative.

B. Claiming Rights

Thus far, I have argued that physical dependence, which includes the special feature of attachment, can disqualify a living being from personhood status, and that both Mary and the non-viable fetus are beings of this sort. In this section, I discuss why this distinction matters in understanding rights.

Under our current legal framework, rights attach to persons.[71] I do not here undertake a full examination of the *content* of the rights of persons. My aim is simply to show that whatever these rights may be and however they might be balanced against each other or trumped by other rights,[72] it is clear that the physically dependent being is not a full rights-bearing agent.

2. Defining Rights

As a preliminary matter, it is important to note that living beings can have claims upon others that do not rise to the level of rights, or to the level of rights

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[69] *See supra*, notes 12–20 and accompanying text.

[70] *See Dominican baby*, *supra* note 64.

[71] I am setting aside the prior question of whether other sorts of beings do or should have rights as a philosophical matter as the purpose of this Essay is to examine the consequences of personhood for our rights framework as it currently exists in the United States.

[72] Most bioethical dilemmas involve this sort of analysis. For example, we must weigh the right of a parent to practice her religion as she sees fit against the right of a child to receive medical treatment. *See, e.g.*, Walker v. Superior Court, 47 Cal. 3d 112 (1988) (upholding the prosecution of Christian Science parents for involuntary manslaughter and felony child endangerment).

owed to persons. For example, one might believe that vertebrate animals have a claim to humane treatment. They do not have a right to life against slaughter for food or clothing products, nor do they have a right to liberty against use in scientific experiments. Rather, they have claims to certain standards of treatment in these settings based on their various capacities.[73] In other words, to determine that a being is not a rights-bearing agent is not to say that it has no interests at all that must be given some consideration when making ethical decisions. For example, a living being with the capacity for suffering might have a particularly compelling interest to be spared pain.[74] One could argue that the interests I am discussing are merely "rights" of other sorts of beings. For the sake of clarity, however, I will refer to "rights" as those that only persons have and "interests" as those that living beings in general might have.

3. Autonomy and Equality

As a technical matter, the rights that persons in a country like the United States possess are granted and enforced by the state. The concept of natural rights still can be helpful, however, in examining the types of rights that persons have in the United States and how rights are related to personhood.

John Rawls has described natural rights as "the rights that justice protects . . . . The existence of these attributes and the claims based upon them is established independently from social conventions and legal norms."[75] These are contrasted with "rights that are defined by law and custom."[76] The rights at stake in biomedical ethics, particularly in issues such as abortion or cases like *In re A*, include claims such as the right not to be harmed by others or the right to decide what to do with one's body. These rights do seem to be those "that justice protects." That is, in addition to constitutionally protected rights, one would expect to see a system of criminal law that prohibits and punishes actions of unwarranted killing or bodily harm, or tort law that establishes liability for those who violate bodily autonomy by performing medical procedures without the consent of the patient.

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[73] I shall return to this point later to argue that, though Mary does not have a right to life, she has certain claims that the court properly took into account in *In re A*. This is to show that the court had a way for accounting for Mary's interest without according her personhood status.

[74] For an especially strong defense of this claim, see SINGER, *supra* note 8, at 57–61 ("If a being suffers, there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that the suffering be counted equally with the like suffering—in so far as rough comparisons can be made—of any other being."). However, even philosophers who take avoidance of pain to be a relatively uncontroversial value still ascribe this as a *human* interest. *See, e.g.*, NAGEL, *supra* note 31, at 166–67 (arguing that "each of us has reason to give significant weight to the simple sensory pleasure or pain of others as well as to his own" but then observing that this is a "human interest").

[75] JOHN RAWLS, A THEORY OF JUSTICE 442 n.30 (revised ed. 1999). Although Rawls makes different arguments about personhood and justice from those presented here, his basic definitions are useful clarifications of how the concepts of personhood and justice interact in philosophical debate.

[76] *Id.*

Contrast with these sorts of rights those that one might consider to be non-natural, for example, the right to bring a lawsuit in a federal court instead of a state court. In this Essay, I do not wish to take up the arguments for precisely which rights are natural or non-natural, or whether, as a philosophical matter, there are even natural rights at all. What is important to notice is that those rights that commentators typically describe as "natural" are those claims against others that we would expect people to have in virtue of their being *persons*, whereas the so-called "non-natural" rights often strike us as instrumental or discretionary and not derived from the fact that the rights-bearer is a person. As Rawls argues, rights-bearing agents are persons because they are the "sorts of beings [who] are owed the guarantees of justice."[77] Philosophers have presented various theories of moral personhood. Two important aspects of personhood emerge from the literature that ties rights to personhood: equality and autonomy.

Equality here refers to the aspects of personhood that are universal. That is, it tries to extract what qualities of persons are "sufficient condition[s] for being entitled to equal justice"[78] or why people ought to be "treated as equals."[79] Autonomy, on the other hand, is the sense in which persons are individual and unique and ought to be respected as such. Rawls's definition of moral personality is one illustration of how these two qualities work together. He writes that "[m]oral persons are distinguished by two features: first, they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree."[80] Both features of Rawls's person are the basis for what is universal about persons, and the first feature is the element of uniqueness that represents autonomy. Rawls's definition of moral personality is not without its problems,[81] and I do not mean to endorse his specific view or a specific *moral* personhood in this Essay.

A more general statement of the argument accommodates different underlying views: Rights-bearing agents are persons because they are "equals" by virtue of possessing the universal qualities of A, B, and C and because they are autonomous by virtue of the capacity to function in X, Y, and Z manner in the world. My argument is that in order to determine that the physically dependent being is not a person with rights, we do not need to agree upon the exact nature of the variables as they might apply to all agents. Rather, I will show how the physically dependent

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[77] *Id.* at 442.

[78] *Id.*

[79] For an account of Dworkin's theory of treating people as equals, see generally RONALD M. DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

[80] RAWLS, *supra* note 75, at 442.

[81] Most notably, Rawls's view might exclude infants, the severely disabled, or persons in a PVS. *See* SINGER, *supra* note 8, at 19.

being fails to be either equal or autonomous and thus does not have the rights that persons have.

The reasons why a physically dependent being is not autonomous largely track the dependency analysis from the previous section. It is perfectly reasonable to think of generally dependent and materially dependent beings as autonomous. Though these beings require forms of assistance from others in order to act in the world, this dependence does not mean that a person is not autonomous. As I argued above, the level of dependence is mostly a matter of degree. These persons need others in order to interact in the world, but because the identities of these others are many and are interchangeable, the person is still acting in the world autonomously, that is, as its own person.[82] However, a physically dependent being can never act in the world as its own person or being because its existence is inextricably part of and tied to that of the specific other.

It is also difficult to see how physically dependent beings could have claims to be treated as equals. Equal treatment means that each person deserving of such treatment has the *capacity* to be treated in a certain manner by other persons at any given time. As a practical matter, rights will involve interactions between specific, identifiable individuals. It is true that they will involve contingencies upon the actions of others and must be balanced against the claim of others. However, they are still universal in character.

Suppose that the specific right we have identified is the right not to be killed. Those persons that are materially dependent possess such a right, and this right must be honored but can also be balanced against the rights and claims of others. Thus, though the right is dependent on the existence of others generally, the right does not hinge on the existence of a specific, identifiable, and unique other. With the physically dependent being, the principle of equal treatment is violated because the "right" of the physically dependent being can never be balanced or respected generally by any other "equal" person without affecting the rights and interests of the attached person.

In other words, a right is not a "right" at all if it is in fact a *claim* against a specific and unique other. As Amartya Sen has explained, "[I]t is not unusual to think of rights as a relation between two parties, *i* and *j* for example, person *i* having the claim on *j* that he will do some particular thing for *i*. There is, however, some advantage in characterizing goal rights as a relation not primarily between two parties, but between one person and some 'capability' to which he has a right, for example, the capability of person *i* to move about without harm."[83] If we are

[82] As argued earlier, there may be *other* qualities of autonomy that disqualify other beings for other reasons, but this does not affect my present argument.

[83] Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3, 16 (1982).

incapable of respecting a person's rights in the general sense, then it is difficult to identify the being with claims as a separate and distinct person.

Returning to the image of the unconscious violinist, I believe that the Thomson thought experiment shows the following: A being that requires such a unique attachment to another is not a person because we cannot conceptualize that being in the same way that we would conceptualize all other persons. Mary is one such being. Her claim is not a right to depend on others for existence. Rather, her identity is *defined* by an inseparable claim on another. I thus claim that Mary is not autonomous in the most basic sense because we cannot respect her rights generally. This is also at the heart of claims about the personhood status of the fetus: We are uncomfortable thinking of a being as a person when its existence is physically and uniquely tied to an autonomous person. In other words, no matter how we formulate and reformulate the status of the fetus, the burdens of dependence cannot be generalized in the way that any other right or responsibility can.

III. Consequences for the Current State of Abortion Doctrine in the United States

A. The Viability Standard

The principle of independent viability is closely related to the concepts of dependence discussed in Part II.A. The legal standard of viability is close, but not completely aligned with the very specific concepts of dependence that I have offered and thus deserves separate treatment.[84] This section directly addresses the legal importance of viability.

In the United States, the state is theoretically supposed to refrain from making decisions about when human "life" begins.[85] Despite this assertion, the Court has announced a standard for when the state develops an interest compelling enough to justify prohibiting abortion. This suggests that there is a point at which the fetus has developed into something which is worthy of state protection that can outweigh the interests of the mother. The point in a pregnancy at which a fetus is viable outside of the womb is the point at which a state "may, if it chooses ... proscribe abortion."[86]

I contend that the Court associated this point with some notion of personhood. In other words, viability is the time at which the fetus acquires rights "be-

[84] Although it is beyond the scope of this paper, I would note that the viability standard might benefit from the sort of dependency analysis in which I engage.

[85] Roe v. Wade, 410 U.S. 113, 162 (1973) ("a State may not adopt one theory of when life begins to justify its regulation of abortions."); *But see* Webster v. Reproductive Health Services, 452 U.S. 450 (1989) (finding that a statement in a statute's preamble that "the life of each human being begins at conception" does not violate this standard).

[86] *Roe*, 410 U.S. at 164–65.

cause the fetus then presumably has the capability of meaningful life outside the mother's womb."[87] Technically, the fetus, as such, does not ever have "rights" because the Court held that it is not a "person" for purposes of the Fourteenth Amendment.[88] The question is always whether the state has a compelling interest in protecting the fetus' life. I will, however, for the sake of brevity, refer to the "rights of the fetus," but this is only shorthand for the state's interest in the life of the fetus.

Whatever "meaningful life" is, it is clearly one way of distinguishing any given life (an acorn, a fish, a monkey, a non-viable fetus) from a life that the state is justified in protecting over other fundamental interests and rights of persons.

The Court has identified other aspects of pregnancy as important factors for deciding the rights of the fetus. Justice Blackmun offered a structure of rights based on the trimesters of pregnancy.[89] The Court has since rejected this formulation, holding that the state has certain compelling interests in regulating abortion from the time of conception, so long as these regulations do not place an "undue burden" on a woman's right to choose abortion,[90] recognizing that "the State has legitimate interests from the outset of pregnancy in ... the life of the fetus."[91] However, this newer standard left the viability standard intact, as the Court reaffirmed that the right of a woman "to choose to have an abortion before viability."[92]

Casey and other cases emphasize that states may enact statutes and promote practices that favor childbirth over abortion. Therefore, a judicial recognition that a being akin to a non-viable fetus has recognizable and meaningful interests may set a precedent for applying that same analysis to the fetus itself. Given the Court's willingness to push back the state's more general interest to the point of conception in *Casey*, these sorts of decisions outside of the abortion context may have a significant impact on how the Court chooses to address the scope of a woman's right to choose an abortion.[93] *In re A* is one such case. Though the court explicitly acknowledged that Mary was not viable "outside" of her connection to Jodie, the court considered her a full person nonetheless.[94]

A decision like *In re A* in the United States would threaten to make viability itself an unusable standard for determining when the fetus acquires a right to life, giving the Court reasons based in fact to overturn *Roe*. This is because, though the joint opinion in *Casey* refused to overturn the basic holding of *Roe*, it suggested that

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[87] *Id.* at 163.
[88] *Id.* at 158.
[89] *Id.* at 164–65.
[90] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872–73 (1992).
[91] *Id.* at 846.
[92] *Id.*
[93] One may be inclined to argue that a woman should have the right to choose an abortion past the point of viability. This is beyond the scope of this paper, as I wish only to address how pro-choice activists can best argue within the current legal framework.
[94] *See supra* notes 11–23 and accompanying text.

principles of stare decisis might support overturning *Roe* if the Court were presented with new facts, or new understandings of facts.[95] In other words, the Court could justify overturning *Roe* by claiming that new "facts," such as personhood analysis from *In re A* demonstrate that even the earliest fetus is a person.

Although I have argued that Mary is very analogous to a fetus, one might still argue that there is a meaningful difference that would allow us to treat Mary as a person. One possible way of distinguishing a fetus that a woman may legally abort from Mary is that the fetus is still inside the womb, whereas Mary is not. However, this distinction is, at best, superficial. It is clear that Mary could not survive independently in the world, either in the philosophical sense of physical dependence or in the legal sense of viability. Thus, the literal physical location of the being seems somewhat beside the point. It is the consequences of being inside the womb that matters, and the consequences here are identical. Thus, a mere existence outside of the womb should not qualify as sufficient to confer rights or personhood status upon a being.[96]

B. Potentiality

The above arguments concerning dependence and viability strongly suggest criteria by which one can make a legal or moral determination about the personhood status of a fetus, or of Mary. There is, however, an alternative ground for understanding the fetus as a rights-bearing "person." This is the theory that the fetus is a *potential* life. Even if one does not believe that an embryo or fetus *is* a human life, one may believe that the potential for human life has a moral status of its own, and that status confers rights upon it that must be balanced (or, more severely, must always trump) the rights and interests of the mother.

Potentiality is a particularly poor value to invoke in the abortion debate. A thorough critique is beyond the scope of this paper, but it is useful to state a sample objection. For example, it is unclear to me how the Supreme Court understands the value of potential life, since that value apparently changes and increases over the course of the pregnancy.[97] This is so despite the fact that the viable fetus has no more potential for life than the weeks-old embryo—it is simply closer to being born.[98] It has been suggested that if the arguments about potentiality were followed to their logical conclusion, then the state would be justified not only in prohibiting

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[95] *Casey*, 505 U.S. at 854–61.

[96] The fact of being born might hold some moral significance, but it is unclear to me that this is related to personhood. For example, in her discussion of the concept of natality, Hannah Arendt explores its implications for personal identity, but not necessarily for the concept of personhood itself. *See* HANNAH ARENDT, THE HUMAN CONDITION 9 (1959).

[97] *See Casey*, 505 U.S. at 833 (acknowledging that the value of potential life increases over the course of the pregnancy).

[98] It may be true that the older the fetus is, the more statistically likely it is to be born. This argument is not convincing, however, as it confuses *potentiality* with statistical *probability*. Statistics do not predict individual events. It is thus impossible to say that the embryo has less "potential" than a third trimester fetus.

abortion at all stages of pregnancy, even in cases of rape, but also in prohibiting the use of birth control.[99] I am further puzzled how we can ascribe any rights or interests to a being that is only potential and is not yet extant. Despite these rather obvious objections to the potentiality argument, it remains central to the abortion debate, and the Supreme Court considers potential for human life an important interest that a state may protect.[100]

The case of Mary has an interesting effect on abortion discourse: it shows that courts and scholars ought to be careful, not only in concluding that Mary is not a person, but also in describing the *reasons* for refusing to ascribe rights and personhood status to Mary. An intuitive argument concerning Mary would be to claim that she has no rights and is not a person because she has no potential for continued life or existence apart from Jodie.

One basis of a moral argument for prohibiting abortions is the concept of potentiality. This concept has been used in other areas of biomedical ethics as well. For example, the American Medical Association Council on Ethical and Judicial Affairs uses the concept of potentiality in formulating their position regarding the status of anencephalic infants.

Anencephalic infants are those born with only a brain stem, "they have never experienced consciousness and will never experience consciousness."[101] The British court found Mary to be in essentially the same condition.[102] The AMA noted that "parents of anencephalic neonates always have the option of discontinuing life-sustaining treatment," and concluded that because the anencephalic neonate had no past interests and no future potential to exist as persons in any meaningful sense that "respect for the essential worth of the anencephalic neonate does not necessarily entail the preservation of its life," and that "anencephalic neonates cannot have interests of any kind."[103] In other words, a lack of potentiality is a valid ground for refusing to recognize a being as a person in the ordinary sense.

It is not difficult to see the next step in the argument: If it is morally permissible to refuse to recognize rights in a being with absolutely no potential for human life, then potentiality is a valid variable for determining personhood. Therefore, pro-life activists can argue that the potentiality of the fetus or embryo is an appropriate consideration in the rights balance considered in the abortion debate. Note that this does not demand the logical conclusion that potentiality is key to understanding the status of the fetus. That is, the AMA argues that (1) being A has no potential for human life, so therefore (2) being A is not a person for purposes of rights analysis.

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[99] *See* DWORKIN, *supra* note 27, at 110–11; SINGER, *supra* note 8, at 83–100.
[100] *See* Roe v. Wade, 410 U.S. 113, 155–56 (1973); *Casey*, 505 U.S. at 854–61.
[101] AMA Council, *The Use of Anencephalic Neonates as Organ Donors*, 273 J. AM. MED. ASS'N 1614 (1995).
[102] *See supra* notes 12–20 and accompanying text.
[103] AMA Council, *supra* note 101.

Thus, the only permissible *logical* conclusion from this argument is that "if a being is a person it has (as one feature) the potential for human life." It does not tell us the direct significance of potentiality. However, this distinction is quite technical. The argument I make in the text is still quite intuitive, and could thus have adverse effects on judicial reasoning regarding abortion rights.

Therefore, when analyzing *In re A*, it is better to focus on the present physical characteristics of Mary rather than make moral arguments concerning her lack of potentiality. Courts have made these considerations when confronted with difficult situations concerning anencephalic infants. For example, a Florida court refused to characterize an anencephalic neonate as "dead,"[104] and the Fourth Circuit held that a federal statute required a hospital to treat an anencephalic infant.[105] These cases support the proposition that potentiality should not be dispositive in making rights and personhood determinations. Furthermore, the protections afforded to these neonates do not dictate a similar conclusion for Mary—they are distinguished on the grounds of dependence argued above. That is, Mary falls into the category of physical dependence along with the non-viable fetus, whereas the anencepahlic neonate is merely materially dependent.[106]

Conclusion

I have argued that the British court in *In re A* reached the correct result in enjoining the parents of Jodie from refusing to consent to the operation to sever the twins. However, I have also argued that the court reached this result by a process of reasoning that may have unexpected results for moral reasoning in the abortion debate.

I have also suggested that this result was not necessary, that the court could have attained its result in a manner consistent with abortion jurisprudence and norms, and in a manner that accounts for the interests at stake. The court ought to have reached the conclusion that Jodie is a person with the full rights-bearing agency that any infant would normally have. Mary, on the other hand, should not have been considered a person. This does not mean, however, that the court would have been forced to disregard Mary's interests altogether. The court could have dealt with Mary in a manner consistent with the law's treatment of sentient vertebrate animals. Indeed, the court made a detailed inquiry into exactly these interests: what sort of feeling Mary might have had and the fact that continued life offered her little but continued suffering. Although beyond the scope of this Essay, I would first argue that the parents have a conflict of interest making them poorly situated,

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[104] *In re* T.A.C.P., 609 So. 2d 588, 594 (Fla. 1992).

[105] *In re* Baby K., 16 F.3d 590, 594 (4th Cir. 1994).

[106] This should not be considered an endorsement of the results in the anencephalic baby cases; rather, it is only a means of distinguishing the results from *In re A* in order to maintain that potentiality is an inappropriate consideration in that case.

both legally and morally, to exert sole control over medical intervention for Jodie. I would then suggest that *only* Jodie be appointed a guardian ad litem, but with the understanding that the guardian could balance the *rights* of Jodie against the *interests* of Mary as Jodie might do if she were competent to make her own decisions regarding medical treatment. Furthermore, appointing a guardian to Jodie (or, alternatively, deciding what is in Jodie's best interests) could include an analysis of the moral or religious views that Jodie might have. Though this possibility is complicated and somewhat problematic, it does signal, at the very least, the existence of a mechanism by which the decision maker may account for the religious beliefs of Jodie's parents. Finally, appointing a guardian ad litem preserves the value at the heart of the pro-choice position: when faced with a difficult decision regarding a physically dependent being, the person ought to be able to *choose for herself* the course of action to follow.

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A FISTFUL OF PROPERTY RIGHTS (BOOK REVIEW)

Andrew P. Morriss*

Terry L. Anderson & Peter J. Hill, *The Not So Wild, Wild West: Property Rights on the Frontier* Stanford University Press, 2004. Pp. 256.

Terry Anderson and P.J. Hill have written and taught about the role of property rights in the West for more than thirty years, together and separately.[1] Both played key roles in elaborating the crucial role of property rights in the history of the American West.[2] In this volume they draw on those thirty-plus years of study and teaching, as well as their personal histories as Montanans and descendants of pioneers, to give an account of the role of property rights on the frontier. Just as Sergio Leone remade the western beginning with the groundbreaking *A Fistful of Dollars*[3] to the film that summarized the themes of his prior work, *Once Upon a Time in the West*,[4] so Anderson and Hill have remade the history of the American West with their work, from their first article to this book. Their work shares three central features of Leone's: a realist's view of the West, recognition of nuance, and close-up

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[1] Their first joint article on the topic appeared in 1975. *See* Terry L. Anderson and Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975).

[2] Hernando de Soto has written eloquently of the importance of this. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 46–62 (2000).

[3] A FISTFUL OF DOLLARS (United Artists 1964).

[4] ONCE UPON A TIME IN THE WEST (Paramount Pictures 1968).